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CONDITIONAL PRIVILEGE FOR MERCANTILE AGENCIES.—MACINTOSH *v.* DUN.

Is a confidential communication made in good faith by a mercantile agency to a subscriber at his request, respecting an applicant for credit, *prima facie* protected under the doctrine of conditional privilege?

Until the decision of the Judicial Committee of the Privy Council in 1908, in the case of *Macintosh* v. *Dun*,[1] this question would generally have been answered in the affirmative; a view sustained by the weight of authority in the United States and in Australia. In that year, upon an appeal from Australia, a contrary result was reached.

A consideration of the above question calls for a description of the institution known as a mercantile agency, and a brief summary of that part of the law of conditional privilege which is applicable here.

What is a Mercantile (or Commercial) Agency?

A mercantile (or commercial) agency is an institution whose business consists in: (1) collecting information relative to the character, credit, and pecuniary responsibility of business men and business concerns likely to become applicants for credit; and (2) confidentially communicating such information respecting any particular person to any paying subscriber in response to specific inquiry on his part.

In other words, the mercantile agency collects information, and furnishes it to its patrons for a cash consideration (at their special request). Their patrons, or customers, are generally "subscribers" who pay an annual fee. An application by a subscriber for infor-

[1] L. R. [1908] A. C. 390.

mation as to a particular person might justify the belief that such information is reasonably necessary to the protection of the subscriber's interests.[2]

We are not now dealing with the questions which arise when a mercantile agency furnishes to all its subscribers information respecting persons concerning whom no specific inquiry has been made, and as to whose standing many subscribers are not interested. The tendency in the United States is to deny immunity in such cases.[3] In *Fitzsimons* v. *Duncan*,[4] Palles, C. B., said: "I am not to be taken as holding that the communication to a client of a book, containing particulars as to the solvency of a number of persons, *with many of whom the inquirer had no intention of dealing*, is within the privilege. I entertain a strong opinion that it is not."

As to that part of the law of "conditional privilege" which is applicable here:

In deference to custom we use the term "conditional privilege." But the words "privilege" and "conditional" are both objectionable.

"Privilege" might be taken to imply that the law confers a special favor upon the defendant which is not open under any circumstances to other persons. The court would entertain a prejudice against a claim to special favor; and would, in case of any doubt, disallow it. But in reality protection is given to all other persons standing in the same situation, in the same circumstances, as the defendant.

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[2]For various definitions see 27 Cyc. 473. In Mr. Errant's Prize Essay on the Law Relating to Mercantile Agencies, published in 1 Law Student's Monthly, the following definition is given: "Mercantile or commercial agencies are establishments which make a business of collecting information relative to the credit, character, responsibility and reputation of merchants for the purpose of furnishing the information to subscribers."

"According to Mr. Errant's essay, the American system of mercantile agencies owes its origin to the work done by one Church, who was at first a commercial traveler. On his business tours it was his custom to make notes for his own use, as to the habits, etc., of different persons and firms with whom he dealt. Other merchants, hearing of his custom, would come to him and ask information in relation to the same persons. At last he was employed by thirty New York houses to travel in the south and west to collect information for them. His labors suggested the idea of establishing an institution which should make a business of collecting information concerning the responsibility, etc., of local business firms and corporations that were seeking credit in the larger cities. In 1841 the first organized 'Mercantile Agency' was formed by Lewis Tappan." Bennett, J., in State *v.* Morgan (1891) 2 S. Dak. 32, 52.

[3]See Sunderlin *v.* Bradstreet (1871) 46 N. Y. 188; and majority and minority opinions in King *v.* Patterson (1887) 49 N. J. L. 417.

[4](1908) 2 Ir. R. 483, 495.

"Conditional" might be supposed to denote the existence of "Conditions Precedent." But in reality the so-called "Conditions" are "Conditions Subsequent." If the "Occasion" exists, there is *prima facie* protection, defeasible only if the plantiff proves certain facts in the nature of conditions subsequent. The burden of proof is upon the plaintiff to show such facts.

A better phrase would be "Defeasible Immunity," suggested by Mr. Bower.[5]

Professor Dicey has rightly said that the law of defamation is a compromise.[6] For present purposes, the subject may be divided into three classes: (1) Absolute liability, irrespective of either conscious fault or negligence. (2) Absolute immunity, irrespective of moral fault; comprising the defences known as Absolute Privilege and Truth. (3) Defeasible Immunity, *alias* Conditional Privilege; a middle class between the other two divisions. In some exceptional situations where it is for the general welfare, or is reasonably requisite for the protection of private interests, that men should feel themselves to some extent free to make statements which are *prima facie* defamatory, the law affords protection; either absolute, or defeasible (*alias* conditional). Absolute privilege is confined to a comparatively limited class of persons or situations. Conditional privilege is a defence open to a larger number of persons, but under important restrictions.

What admissions are involved in setting up the defence of Conditional Privilege?

Why does the law ever allow the defence of Conditional Privilege?

When a defendant, in an action for defamation, sets up the defence of Conditional Privilege (Defeasible Immunity), he virtually admits that he has made a statement about the plaintiff which is defamatory in its nature, likely to cause damage, and not true in point of fact.[7] But he contends that the occasion falls within the special class known as *prima facie* privileged occasions, and that hence he is entitled to immunity, unless plaintiff succeeds in proving that defendant has abused the occasion and has thus forfeited his *prima facie* privilege.

The principle on which the doctrine of conditional privilege

[5]In support of these criticisms, see Bower, Code of the Law of Actionable Defamation, 342-345, 354, 358-361, 426-427, 490. See also Paterson, Liberty of the Press, 184-186.

[6]Dicey, Law and Opinion in England, Appendix, 466.

[7]See argument in Wason *v.* Walter (1868) L. R. 4 Q. B. 73, 76.

rests is, that the public interest and advantage of publication in each particular class of cases outweighs the occasional private and personal damage thereby caused. It is deemed more advantageous for the community at large that particular individuals should occasionally be damaged with impunity, than that men under the privileged circumstances should not be at liberty to speak and publish what they (reasonably?) believe to be true, although it may be defamatory of the character of individuals.[8]

Under the defence of Conditional Privilege two main questions are raised, which are entirely distinct from each other.

1. As to the Occasion.

2. As to Conditions other than the Occasion.

Or more fully:

1. Does the occasion of the speaking or writing give rise to a *prima facie* protection?

2. If (1) is answered in the affirmative, has the defendant, in any way, forfeited or lost the protection *prima facie* afforded by the occasion? What conduct, belief, motive, or state of mind on the part of the defendant will operate to rebut or defeat the protection *prima facie* afforded by the occasion? Has the defendant used the occasion reasonably and honestly, or has he abused it?[9]

"The Occasion" comprises:

1. Private Interest or Duty.

2. Public Interest or Duty.

We are now considering "Private Interest or Duty," which may be subdivided as follows:

[8]This language has been adapted with some change from the argument of counsel in Wason *v.* Walter, *supra.*

[9]Formerly there seems to have been a misapprehension as to the necessary allegations in a defendant's plea of conditional privilege, or perhaps, as to the burden of proof resting on the defendant. It was sometimes assumed that the burden was on the defendant to allege and prove, not only facts sufficient to show that the occasion was *prima facie* privileged, but also to allege and prove that he had not in any way forfeited the *prima facie* protection afforded by the occasion. But, under the more correct modern view, the burden is on the defendant to allege and prove only the existence of a *prima facie* privileged occasion, without inserting in his plea an "anticipatory" rejoinder, denying that he had forfeited the protection. Then, the burden is on the plaintiff to reply and prove that the defendant has in some way forfeited the *prima facie* protection afforded by the occasion. This view is clearly brought out in Bower, Code of the Law of Actionable Defamation, Art. 37, notes (j) and (l); Appendix XIV, § 4.

1. Interest of speaker:

Self-defence. Protection of self-interest. A legitimate personal interest in making the publication.[10]

2. Mutual (special) interest of speaker and hearer: common interest. When speaker has an interest and hearer has a similar or corresponding interest.[11]

3. Interest of hearer (or recipient): the protection of a legitimate interest in the recipient.

Here we are dealing especially with cases arising under the third subdivision. And we assume that the principal reason for holding the occasion to be *prima facie* privileged, is on account of the prospect of benefit accruing to the recipient from his acquisition of the information communicated; and not on account of the desirability of rewarding any special merit on the part of the person who gave him the information.

If an occasion is conditionally privileged, the burden is on the plaintiff to allege and prove facts which will rebut or defeat the *prima facie* protection arising from the occasion. What proof will have the effect of defeating the protection?

Assuming that the communication did not, either in the matter communicated or in the manner of its communication, exceed the reasonable necessities of the occasion, the plaintiff can, nevertheless, defeat the defendant's protection by alleging and proving:

Either, (1) That defendant did not believe in the truth of his statement;

Or, (2) That defendant, even though believing in the truth of his statement, made it from a wrong motive.[12]

It has been quite common to jumble together the two really distinct grounds of want of belief and wrong motive; using the ambiguous term "malice" to cover them both. We think it better

[10] *E. g.*, Blackham *v.* Pugh (1836) 2 C. B. 611.

[11] *E. g.*, Lawless *v.* Anglo-Egyptian etc. Co. (1869) L. R. 4 Q. B. 262.

[12] As to the chronic confusion in the use of the terms "intent" and "motive," see full discussion in 20 Harvard Law Rev. 256-259; and see also 60 Pennsylvania Law Rev. 367. "Motive" is used here not to signify the object or result immediately aimed at, but to denote the reason for aiming at that object.

We must also distinguish here between (a) the effect of wrong motive as evidence bearing on the question whether defendant believed his statement, and (b) its effect as constituting *per se* a substantive ground for defeating the claim of immunity; *i. e.*, as constituting a self-sufficient reason for holding that the defendant has forfeited his claim of privilege. The question here is whether it has the latter effect.

to state each ground separately and avoid the use of the term "malice."[13]

According to some authorities, there is a third ground upon which plaintiff can defeat defendant's *prima facie* protection, *viz.*, by proving:

(3) That defendant, though believing his statement to be true, did not have reasonable ground for such belief.

As to whether *prima facie* protection can be defeated in this way, *i. e.*, by proving want of reasonable ground for belief, there is a conflict of authority. We prefer the view that it can be so defeated.[14]

The final decision in *Macintosh* v. *Dun*[15] is opposed to the weight of previous authority.

The business of the defendants in that case consisted in obtaining information as to the credit and financial standing of persons carrying on business, and in supplying their subscribers, in answer to inquiry as to a specific person, with confidential reports based on this information. In the Australian Reports they are called "a trade protection society;" but they differ from "a mutual trade protection society" such as now exists in Great Britain and Australia (to be described hereafter). In the United States the defendants would be called "a mercantile agency," or "a commercial agency." The defendants furnished to one of their subscribers, in response to a specific and confidential inquiry, a confidential report containing damaging statements as to the commercial and

[13]As to the objections to the use of "malice," see 60 Pennsylvania Law Rev. 368, and notes 5 and 6.

[14]The English Court of Appeals held that it should not be thus defeated. Clark *v.* Molyneux (1877) L. R. 3 Q. B. D. 237. This decision is followed in Robinson *v.* Dun (1897) 24 Ont. App. 287; but Osler, J. A., seems to have thought it wrong on principle. See opinion in same case, p. 295.

In the United States the authorities are not unanimous. In Carpenter *v.* Bailey (1873) 53 N. H. 590, decided four years prior to the English case, it was held that the *prima facie* privilege is defeated if the defendant, although honestly believing his statement, had no reasonable ground for such belief.

Carpenter *v.* Bailey is sustained by Toothaker *v.* Conant (1898) 91 Me. 438; Briggs *v.* Garrett (1886) 111 Pa. 404, 414, and Conry *v.* Pittsburg Times (1891) 139 Pa. 334; see also Douglas *v.* Daisley (1902) 114 Fed. 628, 632-633.

The contrary view is supported by Barry *v.* McCollom (1908) 81 Conn. 293; Bays *v.* Hunt (1882) 60 Ia. 251, 255; Hemmens *v.* Nelson (1893) 138 N. Y. 517, 524; and Taft *v.* First National Bank (N. Y. 1897) 19 App. Div. 423, 425-426.

[15]L. R. [1908] A. C. 390.

financial standing of the plaintiffs. Some of those statements were erroneous. The subscriber had asked for the information to aid in determining whether to give credit to plaintiffs. The trial judge ruled that the occasion was not privileged; and the jury found a verdict for the plaintiffs. But the jury, in answer to specific questions submitted by the judge, made special findings, to the following effect:[16]

1. That the defendants, in making the report, acted from a sense of duty and not from an indirect or improper motive. 2. That the defendants exercised care so far as possible to ascertain whether the statements were true or false before they made them.

The Supreme Court of New South Wales held that the occasion was privileged; but that certain rejected testimony should have been admitted as evidence of "malice;" and that there should be a new trial.[17]

The High Court of Australia, on appeal, held that the occasion was privileged; that the existence of "malice" was negatived by the special findings of the jury; that the rejected testimony was rightly excluded; and that judgment should be rendered for defendants.[18]

Upon appeal from Australia, the Judicial Committee of the Privy Council decided that the orders of both the Australian Courts must be reversed.[19] The opinion, delivered by Lord Macnaghten, holds that a mercantile agency cannot avail itself of the defence of conditional privilege.[20] It was thought that the nature of its business, and the fact that its ulterior motive was to obtain pecuniary compensation, defeated the defence of privilege, which could have been successfully set up by a defendant who had given the same information gratuitously and from purely altruistic motives.

Lord Macnaghten says at the outset:[21] "The question, and the only question on the present appeal, is whether the occasion on which the libels were published was or was not a privileged occasion." We should prefer to say that the occasion was *prima facie* privileged; and that the controversy is as to whether the *prima*

[16]See opinion of Griffith, C. J., in Macintosh *v.* Dun (1906) 3 Commw. L. R. 1134, 1165-6.

[17]N. S. W. (1905) 5 State Rep. 708.

[18](1906) 3 Commw. L. R. 1134.

[19]L. R. [1908] A. C. 390.

[20]This decision is approved by Mr. Bower, Code of the Law of Actionable Defamation, 437-438, 369, 131, and Preface, p. 6.

[21]P. 399.

facie protection is defeated or rebutted by the facts proved in this case. We regard the occasion as *prima facie* privileged, because the recipient (the subscriber) had a legitimate interest to be protected by the acquisition of the information in question. This view, however, is controverted by authorities entitled to respect. They contend that the interest of the addressee is not alone sufficient to render an occasion *prima facie* privileged; but there must also be a duty on the part of the communicator to make the statement; meaning a duty which, by reason of special circumstances, is incumbent on the defendant, but which is not incumbent on members of the general public.[22]

But even if our view as stated above is adopted, it does not finally decide the case in favor of defendants. It is still open to the plaintiffs to show that the *prima facie* protection is defeated or rebutted by the objectionable nature of defendants' methods, or by the existence of a wrong motive on the part of the defendants. And Lord Macnaghten's opinion is, in effect, an argument to establish such a rebuttal.

The following seem to be the crucial passages in his opinion:

Defendants "set themselves in motion and formulated and invited the request in answer to which the information complained of was produced. The defendants, in fact, hold themselves out as collectors of information about other people which they are ready to sell to their customers. It cannot matter whether the customer deals across the counter, so to speak, just as and when the occasion arises, or whether he enjoys the privilege of being enrolled as a subscriber and pays the fee in advance."[23]

Assuming the defendants to be volunteers, "what is their motive? Is it a sense of duty? Certainly not. It is a matter of business with them. Their motive is self-interest. They carry on their trade, just as other traders do, in the hope and expectation of making a profit."

"Then comes the real question: Is it in the interest of the community, is it for the welfare of society, that the protection which the law throws around communications made in legitimate self-defence, or from *bona fide* sense of duty, should be extended to communications made from motives of self-interest by persons who trade for profit in the characters of other people?"[24]

[22]For conflicting authorities, see: Griffith, C. J., in Howe *v.* Lees (1910) 11 Commw. L. R. 361, 366; Isaacs, J., in the same case, 378, 384-385; Erle, J., in Coxhead *v.* Richard (1846) 2 C. B. 569, 608-609; Erle, C. J., in Whiteley *v.* Adams (1863) 15 C. B. [N. S.] 392, 414, 418; Lindley, L. J., in Stuart *v.* Bell, L. R. [1891] 2 Q. B. 341, 348.

[23]Pp. 399, 400.

[24]P. 400. "If one makes it his business to pry into the affairs of another in order to coin money for his investigations and information, he must see to it that he communicate nothing that is false." Jackson, C. J., in Johnson *v.* Bradstreet Co. (1886) 77 Ga. 172, 175.

Lord Macnaghten also lays stress upon the danger that a mercantile agency will resort to improper methods of obtaining information. In this connection he cites approvingly the language used by Knight Bruce, V. C., when a very different question was before him, *viz.*, whether the court should compel a client to disclose a confidential communication made by him to his legal adviser.[25]

The opinion, when analyzed, seems to rest mainly on two grounds. One, the general nature of the business carried on by a mercantile agency. The other, the ulterior motive of the managers of the mercantile agency, *viz.*, a desire to obtain compensation for their services or information.[26]

Upon comparing Lord Macnaghten's opinion with the contrary views previously expressed by Australian and American courts, there would appear to be two main issues for discussion:

1. Whether the advantages of this method, or system, of procuring information so far outweigh the disadvantages as to render it expedient to allow a mercantile agency *prima facie* protection under the doctrine of conditional privilege?

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[25] See pp. 400, 401.

[26] The opinion has sometimes been understood as resting upon the additional ground, that the communication was not a benefit to the entire community, not for the general interest of society, but only a benefit to a class, and that hence the defendants are precluded from setting up the defence of conditional privilege. This view seems to be advanced by Lord Macnaghten on page 399; and is indorsed and elaborated by Vaughan Williams, L. J., and Hamilton, L. J., in Greenlands *v.* Wilmshurst, L. R. [1913] 3 K. B. 507, 521, 525, 526, 534, 535.

If this means that information given to a merchant is not entitled to protection, for the reason that all human beings are not merchants; in other words that protection is denied because merchants "are only a class in society;" (See Darling, J., in 28 Times Law Rep. 117); then the reasoning is erroneous. It is universally agreed that information furnished to a man concerning the character of a person whom he contemplates employing is given on a privileged occasion; and yet "it is an undoubted fact that we are not all employers of servants." Employers are "only a class in society." (See 6 Commonwealth Law Review, 112.)

"Surely it is as much to the interest of the community that the trader or other person making the inquiry should not be swindled or make a bad debt as it is to the interest of the community that a master should not engage a bad servant." Bray, J., L. R. [1913] 3 K. B. 507, 546. In fact, anything that affects a large class of persons affects the interest of the community. If, for instance, the judicial enunciation of an incorrect doctrine should put an end to all manufacturing, factory owners and factory employees would not be the only sufferers. The welfare of the entire community would be substantially impaired. Here wholesale merchants are not the only persons ultimately benefited by the obtaining of such information. "Solvent customers suffer from credit being given to insolvent customers. If a trader has to run a great risk of making bad debts, he must increase the price of his goods to cover himself against that risk." Bray, J., L. R. [1913] 3 K. B. 546. Retail merchants purchasing from wholesale merchants, and individual customers purchasing from retail merchants, are likely to obtain more favorable terms if the wholesale merchant has such information as will prevent him from selling to insolvent customers.

This inquiry calls especially for a consideration and comparison of the advantages accruing to wholesale merchants (subscribers to the agency) and the disadvantages to applicants for credit (the persons whose financial responsibility is the subject of the reports made by the mercantile agency).

2. Does the motive of temporal or pecuniary gain, on the part of the mercantile agency, furnish *per se* a sufficient reason for denying the privilege; assuming that it would have been allowed but for the existence of such motive?

Before entering upon a full discussion of the two main issues above stated, it seems desirable briefly to consider certain arguments and phrases sometimes used in opposition to the allowance of conditional privilege to mercantile agencies. We have in mind some arguments and phrases which involve legal fallacies, or are founded on mistakes of fact as to business methods and necessities. They are put in a form calculated to excite violent prejudice against mercantile agencies, and thus to preclude a full and impartial discussion of the vital issues.

"The law will not recognize a joint stock co-operative slander association limited."[27]

"It has never been held that privilege attaches to a contract to disseminate slanderous information."[28]

"To slander from hatred or vengeance for wrong is bad enough; to do so by contract for money is infinitely worse."[29]

If the above quoted remarks are intended to refer to consciously false statements, the answer is, that no one claims protection for statements of that description. Proof that the maker himself did not believe in the truth of his statement will always rebut the *prima facie* privilege arising from the occasion. But there is a wide distinction between persons who "in bad faith make traffic" of the reputation of others, and persons who aim "only to give correct information to those whose interests entitle them to seek it wherever it may be had."[30]

If, on the other hand, the remarks are intended to assert that statements which are of a defamatory and damaging nature and are also untrue in point of fact, can never find protection under the

[27]Windeyer, J., in Foley *v.* Hall (1891) 12 N. S. W. Rep. (Cases at Law) 175, 176.

[28]Argument for plaintiff in Macintosh *v.* Dun, N. S. W. (1905) 5 State Rep. 708, 713.

[29]Jackson, C. J., in Johnson *v.* Bradstreet Co. (1886) 77 Ga. 172, 175.

[30]Woodruff, J., in Ormsby *v.* Douglass (1868) 37 N. Y. 477, 486.

defence of conditional privilege, the answer is that, upon this doctrine, the defence of conditional privilege can never be allowed in any case whatever. The defence of conditional privilege always presupposes that the defendant has uttered a charge of a defamatory and damaging nature, which was not well founded in fact. If it were not defamatory and (actually or theoretically) damaging, there could be no *prima facie* action for defamation; and if it were true, it could be justified. There would then be no necessity for setting up the defence of privilege.[31]

In *Howe* v. *Lees*,[32] O'Connor, J., said:[33] "The learned Judge in the Court below seems to have held that such a privilege, if it existed, could only protect statements that were true in fact. But such a limitation would render the privilege useless."[34]

It has been said that mercantile agencies "are simply vendors of gossip."[35]

Two implications lurk in this phraseology:

First. That information communicated by a mercantile agency to a subscriber is of no more value than ordinary social gossip.

Second. That no more effort is usually made by a mercantile agency to make sure of the correctness of its information than is made by a repeater of ordinary social gossip.

A strong argument against the first view is furnished by the general custom of modern wholesale merchants and bankers (in this country) to become and continue subscribers to mercantile agencies. The shrewdest business men of the present day would hardly continue to pay for information which is of no substantial value.

Also, in further answer to the first view, reference may be made to strong opinions expressed by judges in favor of the utility of mercantile (sometimes called commercial) agencies.[36]

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[31]See good statement in argument of counsel in Wason *v.* Walter (1868) L. R. 4 Q. B. 73, 76.

[32](1910) 11 Commw. L. R. 361.

[33]P. 378.

[34]*Cf.* Osler, J. A., in Todd *v.* Dun (1888) 15 Ont. App. 85, 99.

[35]Argument of plaintiff's counsel in Fitzsimons *v.* Duncan (1908) 2 Ir. R. 483, 493.

[36]See Johnson, J., in Fitzsimons *v.* Duncan, *supra*, at p. 502; Miller, J., in Ormsby *v.* Douglass (1868) 37 N. Y. 477, 481; Sherwood, C. J., in Mooney *v.* Davis (1889) 75 Mich. 188, 192; Pring, J., in Macintosh *v.* Dun, *supra*, at p. 717 (and see argument p. 713); Barton, J., in same case (1906) 3 Commw. L. R. 1134, 1160; Ingraham, J., in Taylor *v.* Church (N. Y. 1851) 1 E. D. Smith, 279, 283; Orlady, J., in Ralph *v.* Fondersmith (1897) 3 Pa. Superior Court, 618, 624; Bennett, J., in State *v.* Morgan (1891) 2 S. Dak. 32, 51.

The second view is met, not only by the answers just made to the first view, but also by the fact that it is for the interest of mercantile agencies to make strenuous efforts to obtain and furnish correct information. The fact (sometimes urged against them) that they "make a business" of imparting information, renders it for their own interest to furnish *correct* information, and to exert all reasonable effort to that end. If the information given out by them should frequently prove incorrect, they would lose subscribers and would eventually be forced to give up the business.[37]

A communication from a mercantile agency to a subscriber has been spoken of (apparently with disparaging intent) as "information upon hearsay."[38]

In one sense such information *is* hearsay; inasmuch as it is what the agency has learned from its local correspondent. This, however, would be true of a report made by a private agent to a single principal, by whom he was exclusively employed. And yet such a report would undoubtedly be allowed *prima facie* protection.

But the report of the local correspondent of a mercantile agency is not usually made up entirely or principally of "hearsay," in the popular sense of that term. In the first place, the local correspondent usually states what visible property the retail merchant has in his possession or ownership; the amount or volume of business which he appears to be doing; and the incumbrances, if any, which are recorded upon his property. Undoubtedly the report usually states also the general reputation of the retail merchant as to honesty and solvency; but his "reputation" does not consist of what may happen to have been said about him by only one or two of his neighbors. It is rather the aggregate of the opinions held and expressed about him by men in general.

It might be inferred from some statements adverse to mercantile agencies, that those agencies communicate to inquiring subscribers only such information as is unfavorable to an applicant for credit.

But in fact their answers are frequently, and probably in a

In South Dakota, the carrying on of the ordinary business of mercantile agencies is licensed and regulated by the State. See State *v.* Morgan, *supra*, at p. 37.

As to the utility of mercantile agencies, see also 57 Pennsylvania Law Rev. 179; Fletcher Moulton, L. J., L. R. [1913] 3 K. B. 553, 554; Bray, J., p. 546; and *cf.* Hamilton, L. J., p. 542.

[37]See argument of Charles O'Connor, as to the interest of mercantile agencies to make truthful reports. 2 Veeder's Legal Masterpieces, 879-880.

[38]See Fitz Gibbon, L. J., in Fitzsimons *v.* Duncan (1908) 2 Ir. R. 483, 514.

decided majority of instances, favorable to the applicant. The answers are often of great service to him; procuring him not only credit, but also more favorable prices than would otherwise have been named. These points are well brought out in an argument of Charles O'Connor.[39] In respect to giving a servant's character, Wightman, J., said:

"It is quite a mistake to treat questions of this kind as if the law allowed a privilege only for the benefit of the giver of the character. It is of importance to the public that characters should be readily given. The servant who applies for the character, and the person who is to take him, are equally benefited. Indeed, there is no class to whom it is of so much importance that characters should be freely given as honest servants. It is for that object that the communications are protected."[40]

In reference to an association for the protection of trade, which he described as "a mutual information society," Fletcher Moulton, L. J., is reported to have said:

"In the conduct of a business like that of the defendants it is quite a mistake to think that those in charge of it are only inclined to damage the credit of those who wish to purchase. What they want to find out is their true financial stability, and, although no doubt they keep on the side of caution, they are always glad to assure members of the society that they could trust customers, because, of course, business is done in England so largely on credit, and their real object is to guide members of the society as to how far they may safely go."[41]

Mercantile agencies have no pecuniary motive for making a report unfavorable rather than the reverse. Their compensation would be just the same in either event. It is not enhanced by their taking an adverse view of the person who is the subject of inquiry. The same annual subscription is payable to them, whether they report favorably or unfavorably. We have a strong impression that where these reports prove to be incorrect, the error is more likely to consist in taking too favorable a view of an applicant for credit rather than the opposite.

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[39] See 2 Veeder's Legal Masterpieces, 881-882. Mr. O'Connor was one of the greatest lawyers of his day, and during his enormous practice must have gained an extensive knowledge of business methods and business necessities.

[40] Gardner *v.* Slade (1849) 13 Q. B. 796, 801.

[41] This language is understood to be part of the opinion delivered by Moulton, L. J., in the case of David Jones *v.* Basma House, decided by the Court of Appeal in 1907; the only report of which is in the "Shoe and Leather Record," of March 8, 1907. This language of Moulton, L. J., is quoted by Bray, J., in Greenlands *v.* Wilmshurst, L. R. [1913] 3 K. B. 507, 553. See also pp. 533 and 552.

It may be urged that the allowance of conditional privilege to mercantile agencies would result in protecting their misstatements even though they were made "recklessly."

The word "recklessly" as used in this connection, would generally be understood as describing a case where the maker of a statement is indifferent (*i. e.*, does not care) "whether it be true or false." Lord Herschell, in discussing the law of deceit, said that a statement so made is, in effect, a statement made "'without belief in its truth;" "for one who makes a statement under such circumstances can have no real belief in the truth of what he states."[42] A statement which is made "recklessly" in this sense cannot be sheltered under the defence of conditional privilege. The *prima facie* protection is always rebutted when it is shown that the statement was made without a *bona fide* belief in its truth.[43]

Without giving further attention to these misleading statements and phrases, the principal effect of which is to obscure the really important questions, we now take up the consideration of the main issues heretofore stated.[44]

First. Whether the advantages of this method, or system, of procuring information so far outweigh the disadvantages as to render it expedient to allow a mercantile agency *prima facie* protection under the doctrine of conditional privilege?

This inquiry calls especially for a consideration and comparison of the advantages accruing to wholesale merchants (subscribers to the agency) and the disadvantages to applicants for credit (the persons whose financial responsibility is the subject of the reports made by the mercantile agency).

As to the advantages to the wholesale merchant (the subscriber):

How far should the law go in allowing him, or persons connected with him, immunity or privilege; assuming, for the moment, that the law looks only at the benefit to him, and ignores the harm that may accrue to the applicant for credit?

Should the law allow a wholesale merchant to employ a single person as his own private agent (as an agent for him exclusively)

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[42]Derry *v.* Peek (1889) L. R. 14 A. C. 337, 374.

[43]The word "recklessly" might *possibly* be used to describe a case where the speaker believed his statement to be true, but had not previously used reasonable care to ascertain its accuracy. Whether the law of conditional privilege affords protection in such an instance, is a question upon which, as we have previously seen, there is a conflict of authority. See *ante*, p. 192.

[44]See *ante*, pp. 195-6.

to inquire and report to him relative to the solvency of retail dealers who may apply to purchase on credit?

The wholesale merchant would undoubtedly be justified in personally asking for information respecting an applicant for credit; and the reply of a person gratuitously giving him such information would be conditionally privileged. As to this, Tindal, C. J., said:

"The publication is alleged to have taken place in the course of a confidential communication between one tradesman and another, as to the solvency of a third person, whom the inquirer was about to trust. If such communications are not protected by the law from the danger of vexatious litigation in cases where they turn out to be incorrect in fact, the stability of men engaged in trade and commerce would be exposed to the greatest hazard, for no man would answer an inquiry as to the solvency of another."[45]

It is reasonably necessary for the wholesale merchant to obtain information as to the solvency of applicants for credit. It would generally be practically impossible for him to absent himself from his business headquarters long enough to personally gather such information as to customers scattered over a large extent of territory. If he can act only in person and cannot employ an agent, he must frequently fail to acquire the desired information which is requisite to enable him safely to transact business.[46]

If then it is reasonably necessary for the merchant to acquire such information and if it is practically impossible for him to gather this information by his own personal efforts, is it not lawful for him to employ an agent for that purpose; and if it is lawful for the merchant to employ an agent, is it not also lawful for the agent to be employed? And if it is lawful for the agent to be employed, it must be lawful for him to do the work for which he is employed. His report made to his principal is then a lawful act, and is entitled to immunity as made upon a privileged occasion.[47]

"Communications made in the line of a business duty * * * by an agent or employee to his principal or employer are privileged."[48] *Washburn* v. *Cooke*[49] is a direct authority. The same principle includes communications by a principal to his agent.[50]

[45]Smith *v.* Thomas (1835) 2 Bing. N. C. 372, 381.

[46]*Cf.* Bray, J., L. R. [1913] 3 K. B. 551.

[47]"And the agent may properly be paid for his time, labor, and expense in the pursuit of such information." Woodruff, J., in Ormsby *v.* Douglass (1868) 37 N. Y. 477, 485.

[48]Ames, Cases on Torts (3rd ed.) 523, n. 3.

[49](N. Y. 1846) 3 Denio, 110.

[50]Bohlinger *v.* Germania L. I. Co. (1911) 100 Ark. 477. When the principal himself would have been privileged in making a statement to

In *Fitzsimons* v. *Duncan*,[51] Palles, C. B., said:

"It is essential to the carrying on of mercantile business that a wholesale trader, who contemplates selling on credit to a retail trader, should be entitled to make fair and reasonable inquiries as to the solvency of the latter; and if he has that right, so also must he be entitled to depute to another the duty of making those inquiries. Thus, the clients here, Messrs. Simmons, Hay & Co., to whom the alleged libel was published, had an interest in the subject-matter of the communication, *i. e.*, the result of the inquiries; and Kemp & Co." (an incorporated company carrying on the business of mercantile inquiry agents), "who had accepted their deputation, had become and were subjected to the duty of doing that without which such deputation would be of no avail, *viz.*, of making known to their principal the fair result of their honest inquiries. These considerations are sufficient to render the occasion upon which the alleged libel was published a privileged one."[52]

So Charles O'Connor, in his argument at the trial, in support of a motion for a nonsuit, in *Ormsby* v. *Douglass*, New York Superior Court, 1858, said:

"If a man has the right himself to search for information, he has the right confidentially to employ another to search for it; and the right to employ an agent to search for it would indeed be vain and nugatory if it did not include, upon the part of the person who seeks and obtains it, the right to communicate it to his employer."[53]

If a merchant "may commission his clerk to make inquiries as to the financial ability of another person with whom he proposes to deal," he "may employ a particular clerk whose sole duty is to keep the merchant informed as to the responsibility of persons with whom he may have business relations."[54] It is understood that large wholesale houses frequently employ a clerk exclusively for this purpose, who is called "the credit man."[55]

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a third person in order to protect the principal's own interest, the making of such statement by an agent in behalf of the principal will generally be deemed privileged. Baker *v.* Carrick, L. R. [1894] 1 Q. B. 838.

[51](1908) 2 Ir. R. 483.

[52]Pages 494-495. In Sherwood *v.* Gilbert (1870) 2 Albany Law Journ. 323, it was ruled at *nisi prius*, in a New York case, that the privilege accorded to the proprietor of a mercantile agency, under the decision in 37 N. Y. 477, does not extend to the country correspondent of the agency. This distinction seems indefensible.

[53]2 Veeder's Legal Masterpieces, 883.

[54]This language is quoted from page 108 of an article in an Australian periodical, The Commonwealth Law Review, vol. 6, p. 105, criticising the decision of the Privy Council in Macintosh *v.* Dun. The author is Mr. Justice Cussen of the Supreme Court of Victoria. To the statement quoted above, the learned writer adds, "and if he may do that, what difference does it make if he employs a person outside his own establishment, who devotes his entire attention to that particular class of work?"

[55]See Van Syckel, J., in King *v.* Patterson (1887) 49 N. J. L. 417, 441.

Can one wholesale merchant legally join with another wholesale merchant in employing a single person as their common agent to acquire and communicate information as to the solvency of retail dealers who may apply to them, or either of them, for credit?

Can "a number of traders combine together to do more economically and probably much better what each would otherwise have to do for himself?"[56]

"If one merchant may employ his own private agent to seek and communicate such information, there is no legal objection to the combination or union of two or more in the employment of the same agent."[57]

"And, as a consequence, if an agent may act for several, he may make the pursuit of such information his occupation."[58]

(We pass over, for the present, the case of a *mutual* trade protection society, to be considered later.)

Can a wholesale merchant legally contract with a mercantile agency to furnish him information as to the solvency of customers desiring to purchase on credit; and will the information communicated by the mercantile agency be held *prima facie* privileged?

What legal relation does the so-called mercantile agency sustain to the subscriber? Is it the agent of the subscriber; or is it an independent party acting as a principal entirely on its own account?

"It clearly cannot be said, in my opinion, that the occasion would be privileged if the defendant obtained the information by the employment of a paid detective who, independently of his duty arising from his employment as a detective, would owe no duty to the defendant such as that which was owed * * * by servants to their masters, whether in private service or in public service, *e. g.*, the servants of a railway company." Vaughan Williams, L. J., in Greenlands *v.* Wilmshurst,L. R. [1913] 3 K. B. 507, 521-522. See also pp. 520, 528.

This may possibly mean that a servant is protected in obtaining and imparting information in case such work is only one of the incidental duties of his position, but not if such work were the sole occupation for which he is employed. Under this view, protection would be denied to "the credit clerk;" a result not likely to be indorsed by any judge familiar with modern business necessities and methods.

Or the above may (more probably) mean that though a credit clerk is protected, yet a paid detective is not; the alleged distinction being that the credit clerk is permanently employed to do work for a single master, while the detective holds himself out as ready to do this sort of work for any employer who temporarily desires his services. Each makes it his sole occupation to obtain and impart information (for pay). But the credit clerk works all the time for one and the same employer; while the detective may, in the course of a year, be employed by several different persons. These considerations do not seem to afford sufficient ground for distinguishing the two cases.

[56]See Bray, J., in L. R. [1913] 3 K. B. 551.

[57]Woodruff, J., in Ormsby *v.* Douglass (1868) 37 N. Y. 477, 485.

[58]57 Pennsylvania Law Rev. 180.

There is usually a written contract between the subscriber and the mercantile agency; and that contract may purport to constitute the mercantile agency the agent of the subscriber. But the contract must be taken as a whole. It contains other clauses besides that which purports to establish an agency.[59] Looking at the entire contract in its usual form, and at its legal incidents, it seems to us that the mercantile agency is an entirely independent contracting party, acting for itself as a principal, and is not the agent of the subscriber (the wholesale merchant).[60] The so-called "agency" is not subject to the control of the subscriber as to the details of its work (the method of obtaining information), nor as to the selection or discharge of its assistants.[61]

If the foregoing view is correct, then the mercantile agency cannot claim that its communication to a subscriber is privileged on the ground that it is a communication by an agent to his principal.

But the same train of reasoning which, as we have seen, might confer immunity upon an agent, may be urged in favor of conferring protection upon a communication to a subscriber made by a mercantile agency, although regarded as an independent contracting party and not as an agent of the subscriber. The analogy between the two cases is very close.

Why is the communication made by a private agent protected, notwithstanding the agent is actuated by the ulterior motive of obtaining compensation? Is it because the law has a special regard for the agent, and is especially desirous to enable him to earn money? No. It is rather because the law has a special regard for the interests of the wholesale merchant; because the law desires to allow him efficient means of acquiring information which is reasonably necessary for the protection of his legitimate interests. The law may say that, if it is reasonably necessary for the merchant to acquire this information, and if it is practically impossible for him to gather it by his own personal efforts, it is legal for him to employ an agent for this purpose, and the communication

[59] "Whether a certain writing creates the relation of principal and agent is a question of law, and if it can be gathered from the entire instrument that such relation is not in fact established, the mere fact that the parties may otherwise designate counts for naught." 12 National Corporation Reporter, 580.

[60] Such is the conclusion of Mr. Hurd in his very able article in 12 National Corporation Reporter, 579, 616; and we see no answer to his elaborate argument.

[61] See p. 580. A form of contract is printed in the report of Cossette *v.* Dun (1890) 18 Sup. Ct. of Canada, 222, 233-235.

of such agent to his principal is conditionally privileged. This would stand upon the ground that the employment of a private agent is a reasonably necessary method of obtaining the information; and that, if the merchant is not permitted to resort to this method, he will often fail to acquire information which is practically indispensable to his business interests. The court will take judicial notice of the modern methods of business and of the expediency of employing an agent for the above purpose.[62]

But the same general reasoning often renders it expedient, and indeed practically necessary, for the merchant to contract with an independent institution, such as the so-called mercantile agency, to collect the requisite information and furnish it to him. With the modern facilities for rapid locomotion and quick transmission of orders, the customers of wholesale houses are now spread over a very large area. It is practically impossible for a wholesale merchant, by the help of a single private agent, to acquire the information requisite to determine whether to accede to the applications liable to be made to him by possible customers scattered over a wide extent of territory. And it is impossible for any single merchant to acquire such information by the employment of numerous private agents in his exclusive employ, except at an expense which is practically prohibitive.

A court, taking judicial notice of these modern business conditions,[63] might hold that the wholesale merchant can legally contract with a mercantile agency (though regarded not as an agent but as an independent contracting party) to collect and furnish information requisite to the successful transaction of the merchant's business; and which information it is often practically impossible to obtain in any other way. If it is lawful for the merchant to enter into such a contract, it must also be lawful for the other contracting party. And communications made under this lawful contract may be conditionally privileged. Such privilege would, of course, be defeated if the mercantile agency were actuated by some positively wrong motive, *e. g.*, ill will to the applicant for credit. But

[62] See authorities cited in the next note.

[63] "These agencies have become almost a necessity in the transaction of commercial business, and the rules by which they are governed, and the information they gather and impart, are well known to business and commercial men generally, and such information is perhaps more frequently relied upon among such men than that obtained from all other sources, and courts cannot shut their eyes to these facts." Sherwood, C. J., in Mooney *v.* Davis (1889) 75 Mich. 188, 192. As to taking judicial notice, see also Rapallo, J., in Eaton, etc. Co. *v.* Avery (1880) 83 N. Y. 31, 34; Baldwin, J., in Wilmot *v.* Lyon & Co. (1888) 11 Oh. C. C. 238, 253-254.

should the fact that the mercantile agency is actuated by the ulterior motive of obtaining compensation destroy the privilege any more than in the case of a single private agent? Should the immunity be clogged with such onerous conditions as would seriously impair the chance of the merchant's acquiring the desired information?

In upholding the validity of an agreement between merchants for the formation of a "Mutual Trade Protective Society," O'Connor, J., said: "There are some respects in which adequate protection can be secured only by combination."[64] So, if there are situations in which adequate protection to sellers can be secured only by the seller entering into a contract with a mercantile agency (or can be secured by this means much more effectively than by any other method), this fact furnishes an argument for allowing the merchant to enter into such a contract.

But the foregoing views take into account the situation and interest of only one of the parties liable to be affected by sustaining the legality of this mode of obtaining information; while they ignore the harm likely to be occasioned to another party by the use of such a method. In determining the expediency and justice of allowing *prima facie* protection to mercantile agency reports, we must not consider solely the benefits likely to accrue to the subscribers to the agency (wholesale merchants and others).[65] The damage likely to be done to applicants for credit (the men whose financial standing is the subject of the report) must also be weighed.

The damage likely to be occasioned to the applicant for credit, by erroneous unfavorable communications, may be considered principally from two points of view.

1. The harm likely to be directly occasioned to the applicant by the report made by the mercantile agency to the subscriber (the wholesale merchant).

2. The harm likely to indirectly result to the applicant from the extent of publicity involved in this method of obtaining and imparting information; a risk which is obviously greater than in the case of information given by a single individual in direct response to a personal inquiry by the wholesale merchant.

As to 1: Undoubtedly there are occasional instances of unfavorable reports which are founded on mistake, and which cause damage to applicants for credit. But the mere fact that such in-

[64]Howe *v.* Lees (1910) 11 Commw. L. R. 361, 374.

[65]See Hamilton, L. J., L. R. [1913] 3 K. B. 542.

stances occasionally occur is not *per se* a sufficient reason for refusing to allow *prima facie* protection to mercantile agency reports, as a class. To make that the test as to any class of cases would amount to practically abolishing the doctrine of conditional privilege. The fact that, upon certain occasions, mistakes are liable sometimes to occur, constitutes one of the reasons why the law extends to such occasions the shield of conditional privilege. The principle on which the doctrine of conditional privilege rests is, that the public interest and advantage of freedom of publication, in each particular class of cases thus protected, outweigh the occasional private and personal damage thereby caused. It is deemed in certain classes of cases more advantageous for the community at large that particular individuals should occasionally be damaged with impunity, than that men under the privileged circumstances should not be at liberty to speak and publish what they (reasonably) believe to be true, although it may be defamatory of the character of individuals.[66]

The real test here as to the existence or non-existence of conditional privilege is, whether the harm likely to be done to applicants for credit, by mistaken statements of an unfavorable nature, bears so large a proportion to the benefits or advantages likely to be derived by subscribers (wholesale merchants, etc.) through mercantile agency reports, as to render it inexpedient or unjust for the law to afford *prima facie* immunity to the party making the reports (*i. e.*, the mercantile agency).

There is reason to believe that the instances where harm is thus done are very few in comparison with the instances where benefit is received; that the extent of harm thus done to applicants for credit is very slight in comparison with the benefit accruing to subscribers; that correct reports are the rule and erroneous reports the exception.

A very strong presumption to this effect is derivable from a general custom, of which the courts should take judicial notice, *viz.*, the general custom of wholesale merchants and bankers in this country to become, and to continue subscribers to mercantile agencies.[67] If the information given to subscribers should frequently

[66]See argument of counsel in Wason *v.* Walter (1868) L. R. 4 Q. B. 73, 76.

[67]"The very fact of the existence of these protection associations in considerable and increasing numbers shows how necessary it is for a trader to obtain protection against the risk of contracting bad debts." Bray, J., in L. R. [1913] 3 K. B. 507, 546.

"Traders generally support them, and I suppose are the best judges of their own interest." Hamilton, L. J., in L. R. [1913] 3 K. B. 507, 542.

prove incorrect, shrewd business men would hardly continue to make annual payments for its receipt, the number of subscribers would rapidly diminish, and the business of the mercantile agency would soon come to an end. It is obviously for the interest of the mercantile agency itself that the information furnished should be correct, and it is fair to assume that the agency will exert all reasonable effort to that end.[68]

A private detective, when hired by an individual to work on a particular case, may not expect to be employed a second time by the same man. But a mercantile agency looks for permanent employment from the same people. They count upon annual renewals on the part of subscribers. And, in this connection, it should be borne in mind that mercantile agencies have no pecuniary motive for making their report unfavorable to the applicant for credit, rather than the opposite. Their compensation would be just the same in either event. It is not enhanced by their taking an adverse view of the person who is the subject of inquiry. The same annual subscription is payable to them, whether they report favorably or unfavorably.

2. As to the greater extent of publicity involved in the use of this method of obtaining and imparting information:

It is true that the employment of an agent (or middleman) gives the statement—the information communicated—greater publicity than if it were communicated directly to the merchant by the party of whom inquiry was made. But the "increase"—the greater extent of publicity—does not necessarily destroy the privilege. The question would be: Is this mode of doing business (of obtaining information) through an agent reasonably necessary, in order to protect the interest of the merchant which gives rise to the occasion? Is the greater publicity so unreasonable, so unnecessary a mode of proceeding as to justify the law in declaring that the privilege is thereby forfeited?

This is not dissimilar to the question as to the effect of employing the aid of a stenographer, in making a written communication which would clearly be privileged if written by the maker's own hand.

After some hesitation, the English courts have finally held that the employment of a stenographer does not destroy the privilege, if that is a usual and reasonably necessary method of conducting business under such circumstances. This was so decided in *Ed-*

[68] See argument of Charles O'Connor, as to the interest of mercantile agencies to make correct reports, 2 Veeder's Legal Masterpieces, 879.

mondson v. *Birch*.[69] And if the employer is thus protected by the occasion, the stenographer cannot be held unprotected merely because his ulterior motive is to obtain pay from his employer. In *Smith* v. *Streatfeild*,[70] where it was held that the author of a letter was, under the circumstances, *prima facie* privileged in having the letter printed and sending out printed copies, Bankes, J., said that the *prima facie* privilege extended to the printers also.[71]

When information is obtained through a mercantile agency, is the fact that the information passes through one or more intermediaries fatal to the claim of privilege? In the case of the employment of a private agent to obtain and impart information, greater publicity is given to the statement than if the merchant had made inquiry in person. But protection is not thereby forfeited, if this mode of doing business is deemed reasonably necessary. The case of a mercantile agency, as to the question of publicity, is like that of a private agent, with this exception, *viz.*, that the information obtained by the agency, through its local correspondents, is (as we understand it) preserved, for a time at least, in the books or files at the main office of the agency; and may be known to a larger number of intermediaries than in the case where a single private agent is employed. Do these facts destroy the *prima facie* immunity which would otherwise exist? Such a view was taken, as to a mercantile agency, in the comparatively early case of *Beardsley* v. *Tappan*,[72] and a similar view is urged, as to a "Mutual Trade Protection Society," in the dissenting opinion of Isaacs, J., in *Howe* v. *Lees*.[73] The contrary view is forcibly maintained by

[69] L. R. [1907] 1 K. B. 371.

[70] (1913) 109 Law Times Rep. 173; s. c. L. R. [1913] 3 K. B. 764.

[71] This case is stated more fully *post*.

The protection often includes what Mr. Odgers calls "subsidiary publications;" what Mr. Bower terms "ancillary or incidental acts of publication." See Odgers, Libel and Slander (5th ed.) 302-304; Bower, Code of the Law of Actionable Defamation, 162, note (d). Mr. Odgers says: "A man is entitled to act on a privileged occasion in whatever way is reasonably necessary and usual in such circumstances, and if, in so acting, he reasonably employs methods which, in the ordinary course of business, involve a minor and technical publication of the defamatory matter ancillary to the main publication which is privileged, such minor publication is also privileged." Under this head, the learned author instances: the communication to a compositor where a document is printed; or to a stenographer and copyist where dictation is resorted to; or to a law stationer where a fair copy is desirable; or to a translator where a document in foreign language is to be translated into English. (Odgers, 302-304.)

[72] (1867) 5 Blatchf. 407; also reported in 1 Am. Lead. Cas. (5th ed.) 205.

[73] (1910) 11 Commw. L. R. 361, 378.

Caldwell, J., in *Erber* v. *Dun*,[74] and by Depue, J., in *King* v. *Patterson*.[75]

If the above is the only objection; if, apart from this objection, immunity would be allowed; then we think that *prima facie* protection would not be defeated, merely because the defendants had adopted usual business methods in order to preserve the information in a shape capable of immediate use when called for; or because the communication of information to a larger number of intermediaries was an incident to this method. It all comes back to the question whether the use of the mercantile agency system is a reasonably necessary method of obtaining indispensable information.

(To be Concluded.)

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[74](1882) 4 McCrary, 160, 170-172; s. c. 12 Fed. 526, 535.

[75](1887) 49 N. J. L. 417, 428-429. Depue, J. (as to Beardsley *v.* Tappan): "The charge of the trial judge and the reasoning of Mr. Justice Nelson place unreasonable restrictions upon the doctrine of privileged communications. Agents to collect information, clerks to record it and to communicate it to subscribers, on the one hand, and confidential clerks to receive the information in the interest and by the authority of subscribers, on the other hand, are absolutely necessary to the usefulness, if not the existence, of these institutions. The employment of clerks who obtain thereby such information as their duties necessitate—like the intervention of the printer where printing a report is, in the judgment of the court, a reasonable method of communicating to a large body of interested persons, as the shareholders of a corporation—does not take from the transaction its character as a privileged communication." Pp. 428, 429.